Supreme Court, U. S.
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No. 73-662

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
MORTON HOLLANDER,
ANTHONY J. STEINMEYER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–13) is reported at 481 F. 2d 613. The initial opinion of the district court (App. C, *infra*, pp. 15–18) and its opinion on rehearing (App. D, *infra*, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 14) was entered July 19, 1973. The juris-

823-971—73——1

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether sale and transfer of marijuana by an Army officer to an Army enlisted man off post and possession of marijuana by the officer off post are "service-connected" offenses under *O'Callahan* v. *Parker*, 395 U.S. 258, so as to be within the military court-martial jurisdiction.

STATEMENT

The relevant facts have been stipulated (App. E, *infra*, pp. 23–25), and are set forth in the opinion of the court of appeals (App. A, pp. 9–11). Captain Councilman is an Army officer serving on active duty at Fort Sill, Oklahoma (App. E, p. 23). After receiving information from a confidential informant that Councilman was using marijuana at his off-post apartment in Lawton, Oklahoma, the Army's Criminal Investigation Detachment investigated by introducing Councilman to an enlisted undercover agent at an off-post party (App. A, p. 10). The agent, who had participated in numerous other investigations, represented himself to be an enlisted Army clerk at Fort Sill (App. A, pp. 10–11). Thereafter, it is alleged that Councilman transferred marijuana to the undercover agent on two occasions on March 15, 1972, in Lawton, Oklahoma, once by gift and once by sale (App. E, p. 23). At the time of the alleged offenses, Councilman was off post, off duty, and not in uniform (App. E, p. 24). He was then apprehended by civilian authorities. A search of his apartment on March 18, 1972,

revealed additional marijuana (App. A, p. 11). Councilman was taken into civilian custody and later remanded to the military authorities. He was charged with wrongful sale, transfer, and possession of marijuana in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934 (App. E, pp. 23–24). At a hearing preceding court-martial, Councilman argued that the military authorities lacked jurisdiction because his offenses were not service-connected, but the presiding military judge rejected this argument (App. E, p. 24).

Councilman then brought this action against the Secretary of Defense, the Secretary of the Army, and the Commanding General and Staff Judge Advocate of Fort Sill, seeking to enjoin his impending court-martial. The district court held the three alleged offenses were not service-connected and permanently enjoined further court-martial proceedings against Councilman on the three charges (App. C, pp. 15–18). The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the civilian courts of appeals and the Court of Military Appeals on the issue whether drug and marijuana offenses by servicemen are service-connected under *O'Callahan* v. *Parker*, 395 U.S. 258, and *Relford* v. *Commandant*, 401 U.S. 355, when the offenses occur outside the boundaries of a military post.

The main burden of applying the "service-connection" test has been borne by the Court of Military Appeals, "the court to which Congress has confided

primary responsibility for the supervision of military justice in this country and abroad." *Noyd* v. *Bond*, 395 U.S. 683, 695. Soon after *O'Callahan* was decided, the Court of Military Appeals stated that "use of marijuana and narcotics by military persons on or off a military base has special military significance" in light of the " 'disastrous effects' " of these substances " 'on the health, morale and fitness for duty of persons in the armed forces.' " *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277. There, use of marijuana either on or off post and possession of marijuana on post were held service-connected. In later cases, the highest military court held that off-post possession of marijuana or illegal narcotics was also service-connected. *United States* v. *Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310; *United States* v. *Adams*, 19 U.S.C.M.A. 75, 41 C.M.R. 75. Finally, in *United States* v. *Rose*, 19 U.S.C.M.A. 3, 41 C.M.R. 3, unlawful sale of barbiturates off post by one serviceman to another was held service-connected.[1]

In contrast to these decisions, a number of civilian courts have held that various off-post drug offenses

[1] On the other hand, in *United States* v. *Morley*, 20 U.S.C.M.A. 179, 43 C.M.R. 19, sales of marijuana and LSD off post *to a civilian* were held not service-connected. Also, wrongful possession of narcotics paraphernalia (a hypodermic syringe) off post was held not service-connected by the Court of Military Appeals because possession of narcotics instruments does not have "the same kind of direct and immediate effect upon the health, morale, and good order and discipline" as possession of drugs. *United States* v. *Teasley*, 22 U.S.C.M.A. 131, 132, 46 C.M.R. 131.

are not service-connected. In addition to the Tenth Circuit's decision in the present case, the Fifth Circuit has held that use of marijuana by a serviceman off post and off duty is not service-connected. *Cole* v. *Laird*, 468 F. 2d 829 (C.A. 5).[2] Other decisions by district courts have also held that the military lacks jurisdiction over off-post drug offenses. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *Lyle* v. *Kincaid*, 344 F. Supp. 223 (M.D. Fla.); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii). Contra, *Scott* v. *Schlesinger*, No. C.A. 4-2371 (N.D. Tex., Oct. 1, 1973) (off-post sales of marijuana and LSD to servicemen held service-connected). The conflict between these decisions and the decisions of the Court of Military Appeals is continuing and creates much divisive litigation. It can only be resolved by this Court.

2. The issue presented is important, and, in our view, was wrongly decided below. Off-post narcotics and marijuana offenses constitute one of the largest categories of off-post offenses by servicemen over which the military has exercised jurisdiction. In 1967, the Army assumed jurisdiction over 106 such offenses. *Relford* v. *Commandant*, 401 U.S. 355, 370 n. 14. Because of the large number of these cases, the issue regarding the constitutional limitations upon the mili-

[2] Compare, *Diorio* v. *McBride*, 431 F. 2d 730 (C.A. 5) (on-post use and possession of marijuana held service-connected).

tary's jurisdiction to try such offenses should be promptly and authoritatively resolved.

In holding that the off-post possession, transfer and sale of marijuana by an officer to an enlisted man is not service-connected, the court below improperly applied the criteria set forth in *Relford* v. *Commandant*, 401 U.S. 355, 367–369. The nine factors which this Court stressed in determining service-connection recognize the military's interest in maintaining order and discipline (see factors (b) and (c)). Illegal trafficking in prohibited drugs by servicemen constitutes a serious threat to military order and discipline, as the Court of Military Appeals has held.

The threat to military discipline and authority is especially acute where, as here, an officer is involved in illegal drug transactions with an enlisted man. *Relford* also acknowledged that the military's power to try and punish offenses extends "beyond the purely military offense," particularly in areas where civilian courts may "have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community." 401 U.S. at 367–368 (factors (d) and (e)). Here, both participants in the alleged offense were military personnel and the offense had little direct impact upon the civilian community. Thus, local civilian authorities may not fully vindicate the military's special interests in deterring drug abuse. The court below has therefore misapplied the standards set forth in *Relford* in concluding that Councilman's alleged offenses are not service-connected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
ANTHONY J. STEINMEYER,
Attorneys.

OCTOBER 1973.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 72-1812

(Filed July 19, 1973)

BRUCE R. COUNCILMAN, APPELLEE

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., APPELLANTS

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 72-462)

Anthony J. Steinmeyer, Attorney, Department of Justice (*Harlington Wood, Jr.,* Assistant Attorney General, *William R. Burkett,* United States Attorney, *Walter H. Fleischer* and *Michael H. Stein,* Attorneys, Department of Justice, with him on the Brief) for appellants.

Nicholas D. Garrett and *Orin Christopher Meyers,* Lawton, Oklahoma, for appellee.

Before SETH, HOLLOWAY, and MCWILLIAMS, Circuit Judges

SETH, *Circuit Judge.*

Appellants, defendants below, appeal from an order of the United States District Court for the Western District of Oklahoma, permanently enjoining the de-

523-971—73——2

fendants from continuing with court-martial proceedings against appellee.

As a basis of its order, the trial court found that the offenses with which appellee was charged by the military were not "service connected" within the meaning of that term as developed in the decisions of the Supreme Court of the United States in *O'Callahan* v. *Parker,* 395 U.S. 258, and *Relford* v. *Commandant,* 401 U.S. 355.

Appellee Councilman, a Captain in the United States Army stationed at Fort Sill, Oklahoma, was charged under the Uniform Code of Military Justice with the wrongful sale and transfer of marijuana to an enlisted man, Army Specialist Four Glenn D. Skaggs. He was also charged with the wrongful possession of marijuana which took place on another occasion. Although Captain Councilman was charged under Article 134, the general article, the constitutionality of which has been questioned, see *Avrech* v. *Secretary of the Navy,* 41 U.S.L.W. 2497 (D.C. Cir. March 20, 1973); *Levy* v. *Parker,* 41 U.S.L.W. 2597 (3d Cir. April 18, 1973): that issue is not presented to us, and it is unnecessary to decide it in the context of this case.

Councilman sought to have the court-martial proceedings dismissed for lack of jurisdiction, but his motion was denied by the presiding judge of the court-martial. This suit was then commenced.

The facts, which are not in dispute, are as follows: The Army authorities were advised by a confidential informant that Councilman was using marijuana in his off-post apartment. Thereafter, at a party to which he was invited for that purpose, Captain Councilman was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist Four Glenn D. Skaggs. Skaggs was using the name Danny

Drees, and was introduced to Councilman as an Army clerk-typist, also stationed at Fort Sill. Thereafter it is alleged that Councilman on one occasion transferred, and on another sold, small amounts of marijuana to Skaggs, alias Drees.

Based on Skaggs' investigation, Councilman was apprehended by civilian authorities, and a search of his apartment turned up a small quantity of marijuana. Skaggs from time to time also acted on behalf of the civilian authorities. Councilman was subsequently turned over to military authorities, and the court-martial proceedings here in issue were commenced. During all times relevant to the issues in this case, it is stipulated that Councilman was off-post, off-duty, and out of uniform, and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, was in fact on duty in his capacity as an undercover agent.

In *Relford* v. *Commandant,* 401 U.S. 355, referred to by the trial court, the Supreme Court set forth twelve tests which it considered to be implicit from the holding in *O'Callahan* v. *Parker,* 395 U.S. 258. These standards are to be used in determining if offenses are "service connected." A review of the facts in the present case in the light of *Relford* reveals that only one of the standards or factors need be here considered. This one concerns whether the "victim" is engaged in a duty relating to the military. As to this element, we do not consider that Skaggs, alias Drees, was a "victim" in the ordinary sense. Also if the time of the offense is considered, Skaggs was not then engaged outwardly in the performance of any duty relating to the military. The opinion in *Relford* does not indicate that the Supreme Court had in mind this type of situation when it referred to a person performing military duties or to a "victim." The

Relford Court also added nine other factors that should be taken into consideration in arriving at a determination of whether a crime is sufficiently "service connected" so as to confer jurisdiction on a military court. These factors are enumerated at 401 U.S. 367, 369. As to these factors, the Government argues that because the alleged sale and transfer of marijuana was between two servicemen, and particularly here between an officer and an enlisted man, they have shown sufficient "service connection" to enable the military courts to assume jurisdiction over appellee. Of the nine factors, only one might be present here. This factor relates to the rank of the persons involved in the incident or the fact that both were servicemen.

It has been held that the off-base possession of marijuana by a serviceman is not "service connected." *Moylan* v. *Laird,* 305 F. Supp. 551 (D.R.I.). Neither is off-base use of marijuana. *Cole* v. *Laird,* 468 F. 2d 829 (5th Cir.). Nor is the off-base sale by a serviceman to a civilian. *United States* v. *Morley,* 20 USCMA 179. It has also been held that there is no "service connection" when a serviceman commits an off-duty, off-base, out of uniform offense against the dependents of another serviceman, *United States* v. *Henderson,* 18 USCMA 601, although the Court of Military Appeals has held that any offense by one serviceman against another, even if committed off-base, off-duty, and while the offender is in civilian

attire and unaware that his victim is the person or property of another serviceman, is sufficiently "service connected" to confer court-martial jurisdiction. *United States* v. *Camacho,* 19 USCMA 11.

We cannot agree that this sale or transfer of marijuana, as we previously said, involved any "victim," and it appears that "service connection" based on this theory is so remote as to be not at all within the meaning of that term as used by the Supreme Court in *O'Callahan* and *Relford.* See *United States* v. *Cook,* 19 USCMA 13; *Silvero* v. *Chief of Naval Air Basic Training,* 428 F. 2d 1009 (5th Cir.).

The requirement of indictment by a grand jury and the right to a jury trial are not forfeited by a person simply because he chooses, or is in some cases required, to serve his country as a member of the Armed Forces. These rights should be preserved to a serviceman insofar as possible without interfering with military discipline. In the instant case, there is no military connection with the crime other than the fact that Councilman and Skaggs were members of the Armed Forces. The commission of the crimes that appellee stands accused of affects military discipline no more than commission of any crime by any serviceman.

The trial court was correct in its determination that the military was without jurisdiction to proceed with the court-martial of Captain Councilman and in issuing the injunction.

Affirmed.

APPENDIX B

JULY TERM–JULY 19, 1973

No. 72–1812

BRUCE R. COUNCILMAN, PLAINTIFF-APPELLEE

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FT. SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FT. SILL, OKLAHOMA, DEFENDANTS-APPELLANTS

Before Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR. and Honorable ROBERT H. MCWILLIAMS, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is *affirmed*.

HOWARD K. PHILLIPS.
Clerk.

By
(S) LAVON M. ISLBERK,
Deputy Clerk.

APPENDIX C

In the United States District Court for the Western District of Oklahoma

Civil No. 72–462

(Filed July 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FT. SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FT. SILL, OKLAHOMA, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled case came on regularly for hearing before the Honorable Stephen S. Chandler, United States District Judge, the plaintiff, Bruce R. Councilman, appearing in person and by Nicholas D. Garrett and W. W. Godlove, and the defendants appearing by O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, Captain Charles W. Turnbaugh and Captain Perry M. Raymond, both of the Judge Advocate General Corps; and the parties having stipulated as to certain facts hereinafter enumerated, and each having submitted briefs, announced ready for the hearing, and the Court, being fully advised in the premises, finds:

STIPULATION OF FACTS

It was stipulated that Bruce R. Councilman, plaintiff in said cause, is a Captain on active duty in the United States Army and stationed at Ft. Sill, Oklahoma; that plaintiff is presently charged before an Army court-martial with three offenses under the Uniform Code of Military Justice, said offenses being:

1. Wrongful sale of marijuana to Specialist–4, Glenn D. Skaggs in Lawton, Oklahoma, on March 15, 1972, at 10:30 p.m.

2. Transfer of marijuana to Specialist–4, Glenn D Skaggs in Lawton, Oklahoma, on March 15, 1972, at 1:15 a.m.

3. Wrongful possession of marijuana at his apartment in Lawton, Oklahoma, on March 18, 1972.

It was further stipulated that the alleged offenses occurred in the civilian community of Lawton, Oklahoma, while plaintiff was off duty and out of uniform. Immediately following the search of his apartment in Lawton, Oklahoma, plaintiff was taken by the civilian and military authorities to the Lawton Police Department, where he was booked and later removed to Ft. Sill, Oklahoma.

That at all times the civilian courts were open for any one or more of the above charges to be filed.

The Court, for the purpose of this hearing, accepted as true the stipulation that Investigator Skaggs and Investigator Nelson, a CID agent, would testify that Skaggs was introduced to plaintiff, Bruce R. Councilman, in the apartment of Investigator Nelson, who had invited Bruce R. Councilman to attend, and at that time, according to the offered testimony of the defendants, Investigator Nelson introduced Investigator Skaggs as being a man by the name of Danny

Drees, a Specialist–4 Clerk in the Army training center at Ft. Sill, Oklahoma.

That Investigator Skaggs carried on his investigation of Bruce R. Councilman between the dates of March 10 and March 18, 1972. That at all times in his dealings with plaintiff herein, he was in civilian clothes, used the alias of Danny Drees, held himself out as a user of and dealer in marijuana.

That at all times subsequent thereto, Skaggs was used as an undercover agent in which numerous cases were filed by virtue of his activities involving both civilian and military personnel and that many of the military offenders apprehended for drug sales and transfers to Skaggs which occurred in the civilian community have been tried by civilian authorities, but that some have been tried by the military authorities.

That Motions were filed and presented to the presiding military judge of the court-martial proceedings to dismiss the charges against plaintiff because of the lack of jurisdiction of the military to try him in a court-martial proceeding, briefs were filed, evidence heard, and the Motion denied, and that the Court-martial proceeding was set for trial to begin at 9:00 a.m. on July 11, 1972.

CONCLUSIONS OF LAW

The Court, after having examined the Stipulation of Facts, together with oral stipulations above-referred to and having heard arguments of counsel, is of the opinion that the defendants, and each of them, lack jurisdiction to try the plaintiff for the above offenses. *James F. O'Callahan* v. *J. J. Parker,* 395 U.S. 258, 23 L.Ed. 291, 89 S. Ct. 1683 (1969); *Isiah Relford* v. *Commandant, U.S. Disciplinary Barracks,* 401 U.S.

523-971—73——3

355, 28 L.Ed. 2nd 102, 91 S. Ct. 649 (1971); *Moylan* v. *Laird*, 305 F. Supp. 551 (1969).

JUDGMENT

IT IS THEREFORE ORDERED AND DECREED that the defendants, and each of them, be and they are hereby permanently enjoined from proceeding further with the court-martial proceedings against plaintiff on the three above-named charges and specifications.

(S) Stephen S. Chandler,
STEPHEN S. CHANDLER,
United States District Judge.

Approved:
(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
(S) W. W. Godlove
W. W. GODLOVE,
Attorneys for Plaintiff,
(S) O. B. Johnston III
O. B. JOHNSTON III,
Assistant U.S. Attorney,
(S) Charles W. Turnbaugh
CAPT. CHARLES W. TURNBAUGH, JAGC

APPENDIX D

In the United States District Court for the Western District of Oklahoma

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No. Civ-72-462

(Filed August 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

MEMORANDUM OPINION AND ORDER OVERRULING PETITION FOR RECONSIDERATION

On this 3rd day of August, 1972, upon consideration of Petition for Reconsideration with brief attached, the Court finds that on July 5, 1972, the plaintiff filed in this Court (1) Motion for Temporary Restraining Order praying for a temporary restraining order restraining defendants from subjecting the plaintiff to court-martial proceedings scheduled for July 11, 1972, upon the ground that immediate and irreparable injury, loss and damage would result; (2) Motion for Preliminary Injunction; (3) Affidavit in Support of Motion for Temporary Restraining Order; and (4) Briefs in support of the foregoing motions.

Upon presentation of said papers to the undersigned Judge of said Court, an *ex parte* temporary restraining order was denied and the defendants were notified by telephone and agreed to be present the following day at 10:00 o'clock a.m. for a hearing of the Motion for Preliminary Injunction, at which time the parties appeared and the attorneys for the defendants filed Brief in Opposition to the granting of the relief prayed for by the plaintiff.

The Court, having considered the Agreed Statement of Facts, arguments and admissions of counsel, entered findings of fact, conclusions of law and Judgment enjoining the defendants from proceeding further with the court-martial proceedings against plaintiff on the charges and specifications described in the findings of fact. The matter is now before the Court on the defendants' Petition for Reconsideration.

The Court is of the opinion that the four instruments denominated Motion for Temporary Restraining Order, Motion for Preliminary Injunction, Affidavit in Support of Motion for Temporary Restraining Order and Brief filed in support thereof, which were simultaneously filed by the plaintiff on the 5th day of July, 1972, in view of Rule 8(e), meet the requirements of a Complaint as contemplated by Rule 3, FRCP. As authorized by Rule 8(f) in order to do substantial justice, said instruments were considered by the Court as fully complying with Rule 3(a), FRCP. Had objection been raised by defendants at the hearing, said pleadings would have been conformed to the Rules and such an order is hereby entered *Nunc Pro Tunc* as authorized by Rule 15(b) FRCP.

The pleadings filed by the plaintiff fully apprised the defendants of the nature of the relief sought, were served on the defendants' counsel on the date filed, a

day prior to the hearing. The record shows that the defendants were quite familiar with the facts involved regarding which there was no controversy and that defendants were represented by Captain Charles W. Turnbaugh and Captain Perry M. Raymond of the Judge Advocate General Corps, and O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, who announced ready for the hearing, filed written brief and lucidly and skillfully presented the factual and legal propositions involved.

While the Court did not at the time specifically reform the pleadings by changing the titles thereof, they were considered by the Court and counsel for the parties as adequate although not denominated "Complaint". The facts involved and the relief sought were just as clear from the four-corners of the four instruments filed by the plaintiff as if they had been denominated "Complaint", and just as clearly invoked the jurisdiction of the Court and the Court coming to the conclusion that under the law it was necessary for him to enter an injunction against the defendants to prevent irreparable damage to the plaintiff, entered and filed forthwith an Order enjoining the defendants from proceeding further with the court-martial proceedings.

As to the contention of the defendants that plaintiff did not request a permanent injunction and that the Court granted a permanent injunction *sua sponte*, the Court is of the opinion that while the word "permanent" may be superfluous, as a matter of law it simply means that the injunction is permanent until set aside by an appellate court, and signifies that there would be no purpose in entering a Temporary Order since all of the facts involved were before the Court

and it would be useless to grant a Temporary Injunction and set the matter for further hearing on whether or not a Permanent Injunction should be entered, since no good purpose could be served thereby.

The Court sought to effect a just and speedy determination of the action which resulted in a simple, short and inexpensive record for appeal if the defendants wish to apply to an appellate court for relief from the entry of the extraordinary writ of prohibition, all in accordance with the mandate of Rule 1, FRCP.

The Petition for Reconsideration is therefore overruled.

(S) STEPHEN S. CHANDLER,
United States District Judge.

APPENDIX E

In the United States District Court for the Western District of Oklahoma

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No. Civ-72-462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF FACT

It is hereby stipulated by and between the plaintiff and the defendents that the following are true:

Bruce R. Councilman, plaintiff, is a captain on active duty in the US Army and stationed at Fort Sill, Oklahoma. The plaintiff is charged before an Army court-martial with three offenses under the Uniform Code of Military Justice:

(1) Wrongful sale of marihuana to Specialist Four Glenn D. Skaggs in Lawton, Oklahoma, at 10:30 p.m., 15 March 1972;

(2) Wrongful transfer of marihuana to Specialist Four Glenn D. Skaggs at 1:15 a.m., 15 March 1972, in Lawton, Oklahoma; and,

(3) Wrongful possession of marihuana at his apartment in Lawton, Oklahoma, on 18 March 1972.

The alleged offenses occurred in the civilian community of Lawton, Oklahoma, while the plaintiff was off duty and out of uniform.

From 10 March until 18 March 1972, Investigator Skaggs was acting as an undercover agent investigating the plaintiff and others and used the alias of Danny Drees. Skaggs has acted as an undercover agent in numerous cases involving both civilians and military personnel. Many of the military offenders apprehended for drug sales and transfers to Skaggs in the civilian community have been tried by the civilian authorities but some have been tried by the military authorities.

A motion was made to the presiding military judge to dismiss the charges against the plaintiff because of lack of jurisdiction. Briefs were accepted, evidence heard and the motion was denied. Trial on the merits is scheduled for 9:00 a.m., 11 July 1972.

Respectfully submitted.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff,

(S) Bruce R. Councilman.

(S) O. B. Johnston
O. B. JOHNSTON,
Assistant U.S. Attorney for United States.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH, CPT., JAGC,
Attorney for United States, Defendant.

In the United States District Court for the Western District of Oklahoma

No. Civ-72-462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF EXPECTED TESTIMONY

If US Army Criminal Investigator James Nelson and US Army Military Police Investigator Glenn D. Skaggs were present in court and sworn as witnesses, they would testify substantially as follows:

On 10 March 1972, Investigator Nelson, as part of a criminal investigation, held a party in Lawton, Oklahoma at which Investigator Skaggs and the plaintiff were present. Investigator Skaggs was introduced to the plaintiff by Nelson as Danny Drees, a Specialist Four clerk in the Army Training Center at Fort Sill, Oklahoma.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH,
Captain, JAGC,
Trial Counsel.

(S) Bruce R. Councilman
BRUCE R. COUNCILMAN,
Accused.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff.

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